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No. 78-251

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM WRIGHT,

Petitioner,

vs.

PEOPLE OF THE STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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PEOPLE OF THE STATE OF INDIANA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, William Wright, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Indiana, reversing the trial court's order granting him a new trial and thereby reinstating his conviction.

Judgment And Order Below

By opinion in which three Justices joined, a majority of the Supreme Court of Indiana reversed the trial court's order granting petitioner a new trial (No. 876 S 279, as yet, unpublished) set forth as Appendix A, *infra*.[1] Two

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[1]The majority opinion, penned by Hunter, J., in which Givan, C.J. and Pivarnik, J., concur, is hereinafter referred to as "M.Op."

Justices dissented; the dissenting opinion is set forth as Appendix B, *infra.*[2]

Jurisdiction

The opinion of the Supreme Court of Indiana was entered on February 10, 1978; rehearing was denied May 15, 1978. (App. C) Jurisdiction is invoked pursuant to 28 U.S.C. 1257(3) and Rule 22.1 of the Rules of this Court.

Question Presented for Review

Was petitioner deprived of due process of law in the manner by which the Supreme Court of Indiana reversed the trial court's order granting him a new trial on grounds the State failed to disclose exculpatory evidence (that the sole eye-witness failed to identify petition in face-to-face confrontations both immediately after the alleged crime and at a court hearing the next day) which could have affected the outcome of his jury trial?

A. Was the State reviewing court correct in its determination that the trial court erroneously assumed full applicability of *Brady* v. *Maryland,* 373 U.S. 83, as interpreted by *United States* v. *Agurs,* 427 U.S. 97?

B. Assuming the correct standard, per the above cases, is that which was articulated by the majority of the Indiana Supreme Court, to wit: that prosecutorial nondisclosure is constitutional error only when the undisclosed evidence "creates a reasonable doubt that did not otherwise exist," and "the omission must be evaluated in the context of the entire record," *Agurs, supra,* at 112, did the Court properly apply that standard here, to determine that, contrary to the trial court's decision, the jury's knowing that the sole eye-witness' failure to identify petitioner at two face-to-face confrontations might not have created a reasonable doubt, where the jury which convicted him heard only about the photographic identification procedure (later demonstrated (probably) to have been unduly suggestive) and lacked knowledge concerning the two abortive identification attempts?

[2]The dissenting opinion of DeBruler, J., in which Prentice J. concurs, is hereinafter referred to as "D.Op."

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Raising the Federal Question Below

Petitioner, William Wright (hereafter, defendant) was convicted of armed robbery and kidnapping after a jury trial, and upon his direct appeal, the Supreme Court of Indiana affirmed. *Wright* v. *State,* 259 Ind. 197, 285 N.E.2d 650 (1972).

In his post-conviction petition, defendant successfully argued to the trial court that an unconstitutionally suggestive identification procedure (including probable disclosure to the eye-witness of defendant's prior criminal record *before* the witness identified a photograph of defendant) led to his identification; that the sole eye-witness—without whose testimony identifying him, defendant could not have been convicted—failed to identify defendant at two separate face-to-face confrontations both immediately after the incident and the next day at a preliminary hearing; and that the prosecution had failed to disclose this information, rendering it unavailable to the defense at trial. Due process, defendant argued, required a new trial, and the trial court agreed.

On appeal by the State from the order granting him a new trial, defendant persisted in his position as presented to the trial court in his efforts to convince the Supreme Court of Indiana to affirm the lower court's order, raising in his answering Brief the constitutional questions countering the State's arguments for reversal and reinstatement of the conviction.

While the State argued that the trial court should have determined that defendant waived this constitutional argument, the court did not make any determination on waiver, choosing instead squarely to address the constitutional issues presented. (M.Op. App. 5)

Statement Of Facts

At defendant's jury trial, a single eye-witness, one James Woodsmall, identified defendant as the robber-kidnapper. As a central issue here is whether matters going to the heart of the jury's determination of the correctness of this identification of which they were not aware at trialtime,

might have affected the result—might have "created a reasonable doubt that did not otherwise exist,"[3]—the evidence is set forth as Appendix D, *infra,* in detail for the Court's convenience and will not be repeated at length. A summary follows:

First, we must stress that without Woodsmall's identification testimony, not one iota of evidence linked defendant with the crime.

* * *

In February 1969, James Woodsmall was robbed by two men; he was forced to sit between them in the front seat of his car and was driven around for about five minutes. The two robbers abandoned the car in the parking lot of an apartment complex, and defendant was arrested in the general vicinity about a half hour later. (App. 2)

At two hearings in the petition for new trial, it was adduced: (1) Woodsmall had failed to identify defendant both immediately after the occurrence and at a preliminary hearing the following day; and (2) the eventual positive identification was made following a photographic identification procedure found by the trial court to have been unduly suggestive due to the (probable) exposure of the witness to information concerning defendant's prior criminal record. (See App. D.)

* * *

While the State argued that certain matters had been waived, the Supreme Court of Indiana decided the cause on the merits, making no factual determination on this argument. (M.O.App. 5)

* * *

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[3] See M.Op. App. 3.

As the dissenting opinion reveals, the majority has ignored the lower court's factual determination that Woodsmall failed to identify defendant in a courtroom face-to-face confrontation situation one day after the robbery. (See D.Op. App. 6) While the majority did take into account that the witness' failure to identify defendant immediately after the occurrence on the proverbial scene was known to the convicting jury. (M.Op. App. 2-3), the majority ignores the new information of this second failure to identify defendant, which information magnifies and places into proper perspective the witness' later identification following his probable suggestive exposures to defendant's prior criminal record.

REASONS FOR GRANTING THE WRIT

Petitioner was deprived of due process of law in the manner by which the Supreme Court of Indiana reversed the trial court's order granting him a new trial on grounds the State failed to disclose exculpatory evidence (that the sole eye-witness failed to identify petitioner in face-to-face confrontations both immediately after the crime and at a court hearing the next day, and that the witness probably was exposed to defendant's criminal record before finally identifying him from photographs about a week later) which could have affected the outcome of his jury trial.

> **The Supreme Court of Indiana erroneously determined that the trial court incorrectly applied in full scope the due process constitutional principles of Brady v. Maryland, 373 U.S. 83, as interpreted by United States v. Agurs, 427 U.S. 97.**
>
> **Assuming the proper constitutional standard to apply is that which was articulated by a majority of the Indiana Supreme Court, to wit: that the prosecutorial nondisclosure is constitutional error only when the undisclosed evidence "creates a reasonable doubt that did not otherwise exist," and "the omission must be evaluated in the context of the entire record," Agurs, supra, at 112, the manner in which the Indiana court determined the evidence here at issue did not meet this standard deprived petitioner of due process of law.**

• • •

The fulcrum points of this Petition are:

(1) The trial court (the judge who presided at defendant's jury trial), having heard the testimony at

the hearings on defendant's petition for a new trial, correctly determined that the matters not known to the convicting jury might have altered the outcome of the trial. The reviewing court's reversal of this determination is contrary to the evidence, contrary to law, and repugnant to the Constitution.

(2) Upon the facts as here presented, the material adduced at the post-conviction hearings *was* "material" within the meaning of the applicable standards from *Brady* v. *Maryland*, 373 U.S. 83 and *United States* v. *Agurs*, 427 U.S. 97, and the reviewing court's decision to the contrary misinterprets and misapplies this Court's standards of due process of law as therein enunciated.

* * *

Certiorari should be allowed to clarify and delineate the mode of application of the due-process exculpatory-evidence standard in State post-conviction hearings to resolve important questions of fundamental fairness going to the heart of our system of criminal justice in the context of jury trials.[4]

ARGUMENT

The confrontation with the victim at the scene of defendant's arrest was "face-to-face." Yet, the victim could not identify defendant, who had been in custody from the moment of his arrest on February 21, 1969 to the day of the second preliminary hearing on February 27, 1969, six

[4] A similar and somewhat analogous case is presently pending before Your Honors, and we respectfully suggest you consider the seminal issue whether to take this case for review in context with common counsel's prayer for certiorari in *John Scott Roubas* v. *Illinois*, No. 78-212, filed in this Court on August 7, 1978.

days later. There was a preliminary hearing on February 22, 1969 but the tapes of that hearing were destroyed. (Parnell's testimony, Tr. 72) And no one could testify what happened at the February 22, 1969 preliminary hearing. The implication is clear, however, without question, that Woodsmall did *not* identify the defendant on February 22, 1969 because otherwise Parnell would have no reason to show Woodsmall the "several pictures in his office and to discuss with Woodsmall the identification of defendant."[5] It is also clear, without question, that Parnell made available to Woodsmall defendant's FBI rap sheet of a prior felony conviction and numerous arrests. While his testimony at the post-conviction hearings was somewhat equivocal, the learned trial judge perceived that the criminal record of no other person whose photograph was shown was available in the room for Woodsmall. The repeated number of times that Parnell testified that the record "possibly" was shown; that it "could have" been shown; that Woodsmall "probably" looked at the record while it was lying on the table; that he told the attorneys for the defendant that he "probably" showed Woodsmall the defendant's FBI record; and Your Honors' own experience in knowing what occurs when a police officer is giving information to a victim to "aid" him in the identification, all bespeak a suggestive and constitutionally impermissible identification.

Why, if defendant were in custody and Woodsmall was in the police station—would there not be a lineup identification without showing the defendant any photographs and without exposing the victim to defendant's criminal record? Once a suspect is in custody, it is unfair and impermissible to have a photographic identification. It is the

[5] See D.Op. App. 6-7.

fairer procedure, more in consonance with due process of law, to have a lineup. And certainly, there was no independent basis for the identification, because Woodsmall had been unable to identify the defendant in a face-to-face confrontation just after defendant was arrested. *Cf. Wade* v. *United States,* 388 U.S. 218; *Stovall* v. *Denno,* 388 U.S. 293.

• • •

After defendant's arrest, he was viewed by the victim who could not and did not identify defendant as the assailant he had seen one hour previously. (Tr. 21-22, PC p. 60) Accordingly, the witness was subjected to improper police suggestion, often condemned by the courts.[6]

In *Parker* v. *State,* 261 N.E.2d 562 (Ind. 1970), the Indiana Supreme Court stated:

> "One area that is especially sensitive is the mental state of the witness as he approaches the confrontation. The police should take affirmative action to avoid giving the witness the idea that they have the man involved and what they are seeking is a confirmation from the witness."

Here, the police presented a group of pictures to the witness which contained a picture of the defendant (who previously could not be identified) and also advised the witness that this man had a lengthy criminal record. (PC p. 64-67) Such conduct indicated to the witness that in their minds the defendant was the guilty party. This is highly suggestive and improper conduct. See *Simmons* v. *United States,* 390 U.S. 377 (1968);[7] see also *United States*

[6] See, *e.g.,* discussions in *Wade* and *Stovall, supra.*

[7] See *id.* at 383-84.

ex rel. Stevenson v. *Mancusi,* 409 F.2d 801 (2 Cir. 1969); *United States* v. *Gambrill,* 449 F.2d 1148 (D.C. 1971).

Here, the suggestion arose not only from advising the witness of defendant's criminal background but also from showing photographs of defendant after he had been arrested and prior to being identified.

Here, the suggestion was even greater because the witness viewed a photograph of only one person whom he had seen prior (*i.e.,* that of defendant at time of initial confrontation). This procedure clearly indicates police accusation that defendant was the assailant.[8] Under similar circumstances, this Court stated:

> "The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, '*This* is the man.' See *Biggers* v. *Tennessee,* 390 U.S. 404, 407, 19 L.Ed.2d 1267, 1269, 88 S.Ct. 979 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process." *Foster* v. *California,* 394 U.S. 440, 443. (Emphasis in original.)

The situation from the recent opinion in *United States* v. *Hodges,* 515 F.2d 650, 653 (7 Cir. 1975), citing *United States* v. *Evans,* 484 F.2d 1178, 1188 (2 Cir. 1973), is most pertinent:

> "There is no question that the identification testimony is notably fallible, and the result of it can be, and sometimes has been, 'the greatest single injustice than can arise out of our system of criminal law,' *Gregory* v. *United States,* 125 U.S.App.D.C. 140, 369 F.2d 185, 190 (1966), namely the conviction of the

[8] See D.Op. App. 6-7; See also WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 74-83 (1965).

> wrong man through a mistake in identity. The dangers in this area have been well chronicled, and have been the proper subject of careful attention in this and many other courts."

* * *

As the dissenting opinion (App. B) clearly highlights, the majority has ignored the unequivocally established fact that the victim failed to identify defendant, not only "on the scene," but also the following day at an initial preliminary hearing.

Even applying a strict, "letter of the law" standard as enunciated in *Agurs, supra,* this information, coupled with the probable exposure of the victim to defendant's prior criminal record, most probably would have affected the outcome of the jury trial.[9] The jury's awareness of this

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[9] This rule, that a new trial need not be granted on grounds of newly discovered evidence unless it would "probably" produce a different outcome on retrial, finds its origins in a case from this Court; this Court's decision in *United States* v. *Johnson,* 327 U.S. 106 (1945), frequently is cited as authority for the "would probably not produce" rule. The rule therein was mentioned in a footnote (327 U.S. at 110, n.4), and this Court relied solely upon the "frequently quoted and followed rule announced in *Berry* v. *State,* 10 Ga. 511 (1851)."

In *Berry,* the court considered valid and dispositive of another issue in that case, the rule that: "a negro has never been permitted to give evidence in any case, where the rights of a white person were concerned. And when we consider the degraded state in which they are placed by the laws, and the mental, as well as moral ignorance in which most of them are reared, not to advert to other reasons for excluding their testimony, it would be most unreasonable, as well as impolitic, to admit them as witnesses." 10 Ga. at 519.

Since this Court's approval of the "would probably not produce" rule was based upon its acceptance of the formulation in *Berry,* which decision includes the palpably invalid doctrine above set forth, clearly the time has come for re-evaluation of the rule. Constitutional concepts have so radically changed since the period which spawned *Berry* that any current rule traceable thereto bears re-scrutiny.

evidence—even assuming its weight is to be determined by the jury—in the light of every-day experience and common sense, most probably would have been "material" in the *Agurs* sense.

Here, it is so possible that a miscarriage of justice may have resulted, in context of the entire record, that the reviewing court was just plain wrong in concluding that this information was not "material".

* * *

The fact remains, the jury was *not* aware of the suggestive circumstances under which the sole, uncorroborated eye-witness' eventual identification of defendant was made; nor were they aware that the witness had not once, but twice failed to identify defendant in face-to-face situations. To deem this evidence not "material" does violence to the standards as set forth by this Court.

* * *

In sum, the reviewing court's inappropriate arrogation in substituting its judgment for that of the trial judge as to the materiality of the information adduced at the post-conviction hearings and which was not known to the jury which convicted defendant, wreaks violence to the due process standards heretofore iterated by this Court in *Brady* and clarified in *Agurs, supra.*

Certiorari should be allowed so that a man to whom the trial judge has seen fit to grant a new trial need not fear that a reviewing court on a whim may determine that the trial judge's evaluation that the new evidence may have caused the jury to have a reasonable doubt as to that man's guilt,[10] was "wrong."

* * *

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[10] See p. 4, *supra.*

We respectfully request this Court once again to consider this case in context with another presently pending.[11] A majority of the Supreme Court of Indiana, here, and the reviewing courts of Illinois in the *Roubas* cause, have acted in a similar manner in utterly disregarding the considered judgment of the trial judge who, in each instance, properly had determined, in accordance with due process of law, that each defendant was entitled to a new, constitutionally fair, trial. We hesitate to predict a trend, but suggest that the views expressed by these reviewing courts, as highlighted by the instant dissent, (App. B), undermine the concepts meant to be preserved by our Constitution, warranting close scrutiny by this Court.

CONCLUSION

For the foregoing reasons, certiorari should be granted; and, on the merits, the order of the Indiana Supreme Court should be reversed, reinstating the lower court order granting defendant a new trial.

Respectfully submitted,

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[11] See fn. 4, p. 8, *supra*.

APPENDIX

APPENDIX A

In The

SUPREME COURT OF INDIANA

No. 876 S 279

State of Indiana,

Appellant (Plaintiff below),

v.

William Wright,

Appellee (Defendant below)

Appeal From the Hancock Superior Court
The Honorable Paul E. Schrenker, Special Judge

Hunter, J.

This is an appeal by the state from the granting of a Post Conviction One petition. It presents two issues for review:

1. Whether the petitioner met his burden of proof in attempting to show that the state failed to disclose exculpatory evidence; and

2. Whether the court erred in not making a finding on the state's defense of waiver.

The petitioner, Wright, was tried in 1969 on charges of armed robbery and kidnapping. He was found guilty and subsequently raised five issues on appeal. This Court affirmed the trial court on all five issues. *Wright* v. *State*, (1972) 259 Ind. 197, 285 N.E. 2d 650.

In his post conviction petition, Wright alleged that the showing of his prior criminal record to the victim prior

to positive identification was exculpatory evidence which the state failed to disclose. At the hearing on the petition, the court agreed with Wright, granted his petition and ordered a new trial. The court granted relief on the theory that the prosecutor's failure to provide Wright with certain exculpatory evidence violated the requirements of due process enunciated in *Brady* v. *Maryland*, (1963) 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, and *Fair* v. *State*, (1969) 252 Ind. 494, 250 N.E. 2d 744.

The evidence which was not disclosed was brought out at the post conviction relief hearing. The police officer testified that the victim *may* have seen Wright's prior criminal record prior to an identification at police headquarters. He also said that there *may* not have been a positive identification made prior to this time. However, the victim testified at the trial that he was positive of the identification about an hour after the crime.

A summary of the testimony from the record reveals the following.

In February of 1969, James Woodsmall was robbed by two men. He was forced to sit between the two men in the front seat of his car and was driven around for about five minutes. The two robbers abandoned the car in the parking lot of an apartment complex. The petitioner, Wright, was arrested in this area about one-half hour later. Woodsmall was taken to look at the petitioner at that time but stated he could not be sure this was one of the robbers. At the original trial, Woodsmall stated the reason for his indecision:

> " 'I was nervous and confused and I didn't want to be too fast about it or to make a false accusation. I waited for an hour or so until I simmered down. By the time I got to the bank I had simmered down and I knew.'
>
> "He stated that he was then sure that appellant was one of the culprits. Woodsmall was able to get a full front view of appellant when appellant initially climbed into the car and had a side view of him for the course of the ride which lasted about five minutes."

Wright, supra, 259 Ind. at 200, 285 N.E. 2d at 652. Woodsmall further testified at trial that he was sure that petitioner was one of the men and indicated he would not be testifying in court were he not absolutely sure.

I.

Our analysis begins with the recognition that the trial court's assumption that *Brady, supra,* is fully applicable here is erroneous. The case involved prosecutorial suppression of exculpatory evidence after a specific request by the defense for the evidence. The United States Supreme Court has further interpreted the *Brady* rule in situations involving voluntary disclosure in *United States* v. *Agurs*, (1976) 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342. The Court held that a prosecutorial nondisclosure is a constitutional error only when the undisclosed evidence "creates a reasonable doubt that did not otherwise exist," and "the omission must be evaluated in the context of the entire record." *Id.* 427 U.S. 112, 96 S. Ct. 2402, 49 L. Ed. 2d 355.

By this standard, Wright's petition must fail. The evidence viewed in the light most favorable to the petitioner is in the nature of speculations. It is not in itself exculpatory. In view of the facts brought out in the original trial, these speculations do not raise a reasonable doubt about Wright's guilt. The victim testified twice at the trial that he was sure shortly after he left the scene that peti-

tioner was one of the kidnappers. He explained his unwillingness to identify at the scene, and he gave strong and unequivocal identification testimony.

Furthermore, there was no claim of actual suppression of any evidence. The prosecutor told the defense counsel he could see all of the state's files on the case. The possibility of error in an identification must always be considered by defense counsel. The defense was free at any time before or during the original action to question the police and the victim as to the details of the identification procedure. The police officer testified at the post conviction relief hearing that the defense counsel at the original trial had never asked him any questions about the identification. It is not the duty of the prosecution to bear the burden of assembling the defense counsel's evidence. *Ortez* v. *State,* (1975) ..... Ind. App. ....., 333 N.E. 2d 838.

As the United States Supreme Court noted, the ultimate issue is whether the prosecutor's omission is of *sufficient significance* to result in a denial of the defendant's right to a fair trial.

> "[T]here is 'no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.' . . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."

Agurs, supra, 427 U.S. 109, 110, 96 S. Ct. 2400, 49 L. Ed. 2d 353.

The uncertainty of the police officer's testimony considered with the positive statements of the victim about his identification at the original trial means that the evidence

at the post conviction relief hearing does not meet the materiality standard of *Agurs.* Petitioner has failed to carry his burden of proof in showing that the prosecutor was required to voluntarily disclose this evidence.

Perhaps the trial court was not aware of the interpretation of *Brady* enunciated by *Agurs,* but in light of the *Agurs* standard the finding of the trial court is contrary to law and must be reversed.

II.

The state also contends that the trial court erred in not making a finding on the defense of waiver. The state properly raised the defense of waiver at the post conviction relief hearing. This Court has held that when a defense of waiver is raised, the petitioner must then present some substantial basis or circumstance which would satisfactorily show why such grounds were not waived. *Langley* v. *State,* (1971) 256 Ind. 199, 267 N.E. 2d 538. Due to our disposition of this case on issue one, we do not have to consider whether there was a substantial basis shown here to overcome the defense of waiver.

For all the foregoing reasons the decision of the trial court on Wright's petition for post conviction relief is erroneous and should be reversed and remanded with instructions to reinstate the original judgment and sentence.

Judgment reversed.

GIVAN, C.J., AND PIVARNIK, J., CONCUR.

DEBRULER, J., DISSENTS WITH OPINION IN WHICH PRENTICE, J., CONCURS.

APPENDIX B

DeBRULER, J.—Dissenting

Among the specific findings of fact made by the trial court pursuant to Ind. R.P.C. 1, § 6, paragraph 6 is central to the resolution of this appeal. That paragraph follows in full:

> "6. The Court further finds that James H. Woodsmall could not, and did not, identify the petitioner herein in a face to face confrontation with petitioner immediately after the alleged incident; and that *James H. Woodsmall appeared at a preliminary hearing in Marion County, Indiana in Municipal Courtroom 6 on February 22, 1969, and that James H. Woodsmall could not identify petitioner at said hearing;* and that James H. Woodsmall appeared again in Marion County Municipal Courtroom 6 on February 27, 1969, and did on said occasion identify petitioner as one of the persons who allegedly robbed and kidnapped him." (Emphasis added.)

The suggestive face-to-face confrontation between appellee and Woodsmall, referred to in the finding, occurred on February 21, 1969, in the immediate aftermath of the abduction of Woodsmall. Woodsmall did not identify appellee at that time. The crucial part of this finding is the fact presented that on February 22, the very next morning after the fruitless confrontation at the scene, Woodsmall appeared in Municipal Courtroom 6 and still could not identify appellee. If a jury believed that Woodsmall could not make a positive identification of appellee on the 22nd, it would certainly not believe his statement that he first became certain of his identification of appellee on the 21st, within an hour or so after the on-the-scene meeting. If a jury did not believe that statement of Woodsmall, it is very likely that it would conclude that the positive identification of appellee by Woodsmall, first communicated by Woodsmall to the police or anyone immediately prior to the hearing in Municipal Courtroom 6 on the 27th of February, was the product of the suggestiveness of the photographic line-up at which appellee's criminal record was on display and the on-the-scene confrontation. As a result of that the jury would have given little weight to Woodsmall's identification of appellee and therefore a reasonable doubt has been shown to have arisen from the failure of the prosecution to disclose the employment of the suggestive photographic identification procedure utilized on the 27th of February.

The foregoing conclusion rests upon paragraph 6 of the trial court's findings. It remains to be determined whether that paragraph is supported by sufficient evidence. The trial judge heard the testimony of the officer in charge of the case that appellee and Woodsmall appeared in court on the 22nd of February. The officer then unequivocally testified that Woodsmall identified appellee that morning. Under further questioning the officer admitted that he did not remember whether Mr. Woodsmall identified appellee on the 22nd or not. He further testified that if Woodsmall had made a positive identification prior to the 27th, there would have been no reason to employ the photographic identification procedure in preparation for the hearing on the 27th. Contrary to this testimony, the witness later suggested a reason to employ a photographic line-up under such circumstances.

The trial judge heard this testimony, and while it was not unequivocal, the judge was warranted in basing his finding in paragraph 6 upon it. The judgment of the trial court should be affirmed.

Prentice, J., concurs.

APPENDIX C

STATE OF INDIANA

No. 876S279

STATE OF INDIANA V.
WILLIAM WRIGHT

You are hereby notified that the Supreme Court has on this day denied Appellee's Petition for Reconsideration (Rehearing) without opinion. Given, C.J.

May 15, 1978

APPENDIX D

EVIDENCE ADDUCED AT HEARINGS ON POST-CONVICTION PETITION

Sgt. Dennis Hawkins of the Indiana Police testified that on February 21, 1969 defendant was handcuffed in the presence of the victim Woodsmall. Defendant and victim were "face to face". Woodsmall did not identify the defendant, "he did not commit himself one way or another." At the original trial in January, 1971, Hawkins said that Woodsmall stated "he could not be sure of the identity of the defendant," see App. 2, and such is his testimony at this post-conviction hearing. (Tr. 36-47)

Det. James Parnell testified that he was in charge of the investigation. Woodsmall had a face-to-face confrontation with defendant at the scene of defendant's arrest. (Tr. 46) About 90% of the time, an identification is made at the scene of the crime where the eyeball witness confronts a suspect. (Tr. 49) In his opinion, it was "odd" that Woodsmall did not identify the defendant.

Parnell was not sure whether Woodsmall had identified the defendant in court on February 22, 1969 (one day after defendant's arrest). (Tr. 52-56) Woodsmall did make an in-court identification of defendant at the preliminary hearing on February 27, 1969. Before the preliminary hearing on February 27, 1969, Parnell showed Woodsmall several pictures in his office, one of which was of defendant. *It was possible he showed Woodsmall defendant's criminal record.* (Tr. 57) He had conversations with Woodsmall for the purpose of assisting Woodsmall in the identification of defendant. (Tr. 61-62) He probably told Attorney Eisele (counsel for defendant at p-c hearing) "that it would have been possible for Mr. Woodsmall to have seen this record."

(Tr. 63; reference to defendant's FBI rap sheet) "It is very possible that he [Woodsmall] did see it." (Tr. 63) In a conversation on June 1, 1973 before the p-c hearings, Parnell spoke with Attorney Eisele and Jan Helbert (attorneys for defendant) and told them there was a discussion with Woodsmall regarding the defendant's criminal record. (Tr. 66-67) He told the lawyers that he "probably" showed Woodsmall the defendant's FBI records before Woodsmall made the identification in court. (Tr. 67) On cross-examination by prosecutor Bruning, Parnell testified that the transcript of probable cause hearings were destroyed. (Tr. 72) He did not know when the formal identification took place. (Tr. 78-79) On re-direct examination by attorneys for defendant, Parnell stated he was not clear why, if Woodsmall identified the defendant at the court hearing on February 22, 1969, he had showed Woodsmall the pictures prior to the preliminary hearing on February 27, 1969 he testified that if there were a positive identification, "those things" [referring to showing the pictures and the FBI record] wouldn't be necessary. (Tr. 85-86).

(Mr. Eisele wanted to inquire of Parnell whether he ever told the prosecutor that he showed the arrest record of defendant to Woodsmall, but through a series of objections and colloquy the question never was answered.) (Tr. 88-90)

At the second p-c hearing on July 29, 1975, Det. Parnell again testified he stated that the prosecutor Bruning had criticized him for his testimony at the trial.

With respect to the defendant's driver's license, which contained a photograph of the defendant and was taken from the defendant at the time of his arrest, Parnell testified that it was probably destroyed.

He again testified that his recollection was strong that Woodsmall had not made any identification of the defendant before he showed Woodsmall the several pictures in his office (on examination by the prosecutor he stated that "several" meant about 10 pictures). He did repeat his testimony in the first hearing that Woodsmall probably saw the defendant's FBI rap sheet which showed convictions of murder, narcotics and a large number of arrests. He obtained the defendant's picture from the FBI, but did not know where it was at the time of the hearing.